Supreme Court, U. S.
FILED
DEC 21 1979
MICHAEL RODAK, JR., CLERK

No. 79-381

In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL J. WENGLER, APPELLANT

v.

DRUGGISTS MUTUAL INSURANCE CO., ET AL.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MARK L. GROSS
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Question presented	1
Interest of the United States	2
Statement	4
Summary of argument	7
Argument:	
I. The Missouri workmen's compensation statute impermissibly discriminates on the basis of gender and thereby violates the Equal Protection Clause of the Fourteenth Amendment	9
A. The statutory presumption that wives are dependent upon their husband's earnings unconstitutionally discriminates against both widowers and working women	9
B. The statutory presumption that a wife is dependent upon her husband's earnings cannot be upheld as an attempt to remedy economic discrimination against women	15
C. The statute cannot be upheld on the ground of a presumption that widows' dependency requires that they receive death benefits without the delay of lengthy proceedings	22
II. This Court should remand the case to the Missouri Supreme Court to select the method of curing the constitutional violation	25
Conclusion	28
Appendix	1a

CITATIONS

Cases: Page

Arp v. *Workers' Compensation Appeals Board*, 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 ..... 8, 26, 27, 1a
Califano v. *Goldfarb*, 430 U.S. 199 ..... *passim*
Califano v. *Webster*, 430 U.S. 313 ..... 12, 15
Califano v. *Westcott*, No. 78-437 (June 25, 1979) 20, 26
Coffin v. *Secretary of HEW*, 400 F. Supp. 953, appeal dismissed, 430 U.S. 924 21
Craig v. *Boren*, 429 U.S. 190 ..... 12, 27
Frontiero v. *Richardson*, 411 U.S. 677 ..... *passim*
Jablon v. *Secretary of HEW*, 399 F. Supp. 118, aff'd, 430 U.S. 924 ..... 21, 26
Kahn v. *Shevin*, 416 U.S. 351 ..... 6, 19
Kalina v. *Railroad Retirement Board*, 541 F.2d 1204, cert. denied, 431 U.S. 909 26
Maltz v. *Jackoway-Katz Cap Co.*, 336 Mo. 1000, 82 S.W.2d 909 ..... 17, 18
Matthews v. *Lucas*, 427 U.S. 495 23
Orr v. *Orr*, 440 U.S. 268 ..... 19, 27
Parham v. *Hughes*, No. 78-3 (Apr. 24, 1979) 22
Passante v. *Walden Printing Co.*, 53 A.D.2d 8, 385 N.Y.S.2d 178 ..... 8, 27
Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 21
Reed v. *Reed*, 404 U.S. 71 ..... 12, 22
Schlesinger v. *Ballard*, 419 U.S. 498 7
Skinner v. *Oklahoma*, 316 U.S. 535 27
Stanton v. *Stanton*, 421 U.S. 7 27
Taylor v. *Louisiana*, 419 U.S. 522 22-23

Cases—Continued Page

Tomarchio v. *Township of Greenwich*, 75 N.J. 62, 379 A.2d 848 ..... 8, 27, 1a
Weinberger v. *Salfi*, 422 U.S. 749 16
Welsh v. *United States*, 398 U.S. 333 26
Weinberger v. *Wiesenfeld*, 420 U.S. 636 ..... *passim*

Constitution, statutes and regulations:

United States Constitution, Fourteenth Amendment, Equal Protection Clause ..... *passim*
Pub. L. No. 92-576, Section 20(c)(1), 86 Stat. 1265, amending the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902 3
Pub. L. No. 93-416, Section 6, 88 Stat. 1145, amending the Federal Employees' Compensation Act, 5 U.S.C. 8110 3
Pub. L. No. 95-216, Section 341, 91 Stat. 1548 3
15 U.S.C. 1691e(g) 2
20 U.S.C. 1682 2
20 U.S.C. 1706 2
42 U.S.C. 607 20
42 U.S.C. 2000c-6 2
42 U.S.C. 2000e-6 2
42 U.S.C. 2000h-2 2
42 U.S.C. 3613 2
Mo. Ann. Stat. (Vernon 1979 Cum. Supp):
§ 287.240 ..... 4, 9
§ 287.240(2) 11
§ 287.240(4) 17
§ 287.390 25
§ 287.450 24
§ 287.480 25

Constitution, statutes and regulations—Continued — Page

Mo. Ann. Stat. § 287.490 (Vernon 1965) .. 25
29 C.F.R. 1604.9(a) 2
29 C.F.R. 1604.9(b) 2
29 C.F.R. 1604.9(d) 2

Miscellaneous:

United States Department of Commerce, Census of Population: 1970, Vol. I, *Characteristics of the Population* 23
United States Department of Commerce, Fourteenth Census of the United States 23
United States Department of Commerce, Sixteenth Census of the United States.. 23
United States Department of Health, Education, and Welfare, *Social Security and the Changing Roles of Women* (Feb. 1979) 24

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER, APPELLANT

v.

DRUGGISTS MUTUAL INSURANCE CO., ET AL.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether Missouri's workmen's compensation statute, which provides death benefits to a woman when her husband dies in a work-related accident, pursuant to a presumption of dependency, but conditions the payment of such benefits to a man on proof of dependency upon his wife's earnings, impermissibly discriminates on the basis of gender and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

Congress has authorized the Attorney General to intervene on behalf of the United States in any action of general public importance involving allegations of denials of equal protection based on sex, as well as race, color or national origin. 42 U.S.C. 2000h-2. The United States also enforces civil rights statutes which prohibit discrimination based on sex. See 15 U.S.C. 1691e(g) (credit transactions); 20 U.S.C. 1682 (federally assisted educational programs); 20 U.S.C. 1706, 42 U.S.C. 2000c-6 (school admission); 42 U.S.C. 2000e-6 (employment); 42 U.S.C. 3613 (housing). The protection afforded employees by workmen's compensation is a benefit of employment. As a result, awards of workmen's compensation based upon sex may well constitute a violation of Title VII with respect to which the United States has enforcement responsibilities. See 42 U.S.C. 2000e-2(a)(2), and 29 C.F.R. 1604.9(a), (b), and (d).

This case presents an equal protection challenge to a state workmen's compensation statute that provides automatic death benefits to a surviving wife pursuant to a presumption of dependency but conditions the payment of benefits to a surviving husband upon a showing of dependency upon his wife's earnings or incapacity. In a divided decision, the Supreme Court of Missouri upheld the statute on the ground that it was intended "to satisfy a perceived need widows generally had, which need was not common to men whose wives might be killed while working" (J.S. App. A-10). In the court's view, the

economic hardship resulting from a working spouse's death was more immediate and pronounced on women than on men and the appellant had not presented any statistical evidence to the contrary.

In recent years, this Court has struck down similar gender-based classifications in federal statutes. See, *e.g.*, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). These decisions prompted Congress in December 1977 to direct the Secretary of Health, Education, and Welfare and the Task Force on Sex Discrimination of the Department of Justice to identify those provisions in the Social Security Act which award benefits on the basis of presumptions of dependency and to propose the means for their elimination. See Pub. L. No. 95-216, Section 341, 91 Stat. 1548. In February 1979, the report was transmitted to Congress. It suggests the method by which the few remaining gender-based classifications in the Social Security Act may be removed. Moreover, Congress has recently equalized the benefits paid under federal workers' compensation-type statutes to surviving husbands and wives of federal employees. See, *e.g.*, Pub. L. No. 93-416, Section 6, 88 Stat. 1145, amendments to Federal Employees' Compensation Act, 5 U.S.C. 8110; Pub. L. No. 92-576, Section 20(c)(1), 86 Stat. 1265, amendments to Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. 902. Given the prohibition of the civil rights statutes against gender-based discrimination in employee compensation, the

United States has a direct interest in insuring that state statutes rest upon comparable standards of equality between men and women.

STATEMENT

1. The facts are fully stipulated and may be summarized as follows: On February 11, 1977, appellant's wife, Ruth Mae Wengler, was killed in a work-related automobile accident in the parking lot of her employer, appellee Dicus Prescription Drugs, Inc. At the time of her death, Ruth Mae Wengler's wages were $69 per week. Appellant was not dependent for his support on his wife's earnings during her lifetime and was not physically or mentally incapacitated from earning income (J.S. App. A-1, A-22 to A-23).

Appellant filed a claim for death benefits under Missouri's Workmen's Compensation Law, Section 287.240 (Mo. Ann. Stat. § 287.240 (Vernon 1979 Cum. Supp.)). The rate of compensation at which such benefits were payable was $46 per week (J.S. App. A-23). Under the Missouri Workmen's Compensation Law, a widower is not entitled to death benefits unless he (1) is mentally or physically incapacitated from wage earning; or (2) proves actual dependency upon his wife's earnings. On the other hand, a widow qualifies for death benefits without having to prove actual dependency on her husband's earnings (J.S. App. A-1 to A-2).

After a hearing on July 21, 1977, before a referee of the Missouri Labor and Industrial Relations Committee, the referee denied appellant's claim on the ground that he did not meet the statutory requirements of incapacity or dependency. On review, the Missouri Labor and Industrial Relations Commission adopted the referee's decision denying compensation (J.S. 4-5). Both the referee and the Industrial Commission rejected appellant's claim that the disparate treatment of widows and widowers violated the Equal Protection Clause of the Fourteenth Amendment. In their view, only a court had the authority to hold a statute unconstitutional (J.S. App. A-24).

The Circuit Court of Missouri reversed (J.S. App. A-21 to A-25). It held that the provision of the Missouri Workmen's Compensation Law that restricts the payment of death benefits to only those surviving husbands who are incapacitated or dependent upon their wife's earnings violates the Equal Protection Clause of the Fourteenth Amendment because the restriction does not apply to surviving wives (J.S. App. A-25).

2. In a 6-1 decision, the Supreme Court of Missouri reversed and upheld the constitutionality of the statute. The court acknowledged that to withstand scrutiny under the Equal Protection Clause, "classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" (J.S. App. A-4). It concluded that the Missouri statute met this standard because the purpose of the conclusive presumption of dependency in favor of widows "was to satisfy a perceived need widows generally had, which need was not common to men whose wives might be killed while working" (J.S. App. A-10). As the court saw the

matter, "the substantive difference in the economic standing of working men and women justifies the advantage that [the Missouri statute] administratively gives to a widow" (J.S. App. A-11).

In the court's view, it seemed reasonably certain that the data available to the Missouri legislature at the time the statute was first enacted in 1925 would have "supported the concept that a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower" (J.S. App. A-10). In this respect, the court analogized the statutory presumption of dependency favoring widows to the $500 real estate tax exemption for widows upheld in *Kahn* v. *Shevin*, 416 U.S. 351 (1974).

The decision below distinguished *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), in which this Court struck down gender-based presumptions of dependency in favor of women under the Social Security Act. The court did not regard those cases as controlling because the Social Security program is a form of social insurance funded by mandatory employee contributions while Missouri workmen's compensation law is a substitute for common law tort remedies and is funded solely by employers (J.S. App. A-9).

The dissenting judge expressed the view that *Weinberger* v. *Wiesenfeld*, *supra*, was controlling and compelled the conclusion that the statute violated the Equal Protection Clause. He concluded that the

gender-based distinction in the Missouri statute was premised on the " 'archaic and overbroad' generalization, * * * 'not * * * tolerated under the Constitution' * * *, namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support" (420 U.S. at 643, quoting from *Schlesinger* v. *Ballard*, 419 U.S. 498, 507, 508 (1975)).

SUMMARY OF ARGUMENT

1. Under Missouri's workmen's compensation statute, the wife of an employed husband is conclusively presumed to be wholly dependent for support on the husband, and receives a full death benefit when the husband is killed in a work-related accident. However, the husband of an employed wife is accorded no such presumption, and receives benefits for the death of the wife only when, and to the extent that, he can prove he was actually dependent on her income. The Supreme Court of Missouri upheld this disparate dependency test as a means of redressing the legacy of economic discrimination against women and as an administratively convenient method of insuring that deserving women receive benefits. But the gender-based discrimination of the statute does not advance either goal and therefore violates the Equal Protection Clause.

This Court's decisions in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), control this case and require reversal of the decision below. There, the Court pointed

out that statutory presumptions that wives are dependent upon their husbands are not actually designed to remedy the effects of sex discrimination but are based on the outmoded assumption that wives remain at home and do not participate in employment of any significance. Although remedying the effects of discrimination against women may be a valid basis for properly drawn gender-based legislation, a conclusive presumption that wives are totally dependent on their husbands for support does not withstand constitutional challenge.

This Court's decisions also reject the Missouri Supreme Court's justification of the presumption as an administrative convenience. According differential treatment to men and women for the sole purpose of achieving administrative convenience is to make the arbitrary legislative choice forbidden by the Constitution.

Finally, Missouri's disparate treatment of the sexes is an exception to the current trend in this country. Forty-three of the 50 states treat men and women equally for purposes of determining dependency under workmen's compensation (see Appendix, *infra*). In three of these states, recent decisions have held unconstitutional statutes with a presumption of dependency identical to that at issue in this case. See *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal.3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977); *Passante* v. *Walden Printing Co.*, 53 A.D.2d 8, 385 N.Y.S.2d 178 (1976); *Tomarchio* v. *Township of Greenwich*, 75 N.J. 62, 379 A.2d 848 (1977). And, as we have noted (*supra*, page 3), the federal workers' compensation statutes have recently been amended to treat spouses equally.

2. There are two equally constitutional remedies that would cure the defect of the Missouri statute. The presumption of dependency could either be extended to widowers or eliminated for widows. Since the provision at issue is a state statute, the decision on whether to extend the presumption to widowers or eliminate it for widows is one which is more appropriately made by the Supreme Court of Missouri. We therefore suggest that this Court hold the presumption unconstitutional and remand the case to the Supreme Court of Missouri to choose the remedy most closely in accord with the intent of the legislature.

ARGUMENT

I. THE MISSOURI WORKMEN'S COMPENSATION STATUTE IMPERMISSIBLY DISCRIMINATES ON THE BASIS OF GENDER AND THEREBY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. The statutory presumption that wives are dependent upon their husband's earnings unconstitutionally discriminates against both widowers and working women

1. Appellant's wife was killed in a work-related accident. It is stipulated that he was not dependent upon her earnings for support. Under the Missouri Workmen's Compensation Law (Mo. Ann. Stat. § 287.240 (Vernon 1979 Cum. Supp.)), appellant was ineligible to receive any death benefits from his wife's employer following her work-related death.

But if the sexes of the *dramatis personae* had been reversed and appellant were a woman whose husband died in a work-related accident, she would have received an award of $46 per week without regard to whether she was dependent for support upon her husband's earnings. This benefit would be payable for the rest of her life and would terminate only upon her remarriage.

This disparate treatment is a consequence of the operation of Missouri's conclusive presumption that wives are dependent upon their husbands' earnings but that husbands are not necessarily dependent upon their wives' earnings. As a result, similarly situated male and female spouses do not receive the same benefits. A widower, like appellant, who is not dependent on his working wife, receives nothing when she dies in a work-related accident, while a widow who is not dependent, or only partially dependent, on her working husband, receives a full death benefit when the husband dies in a work-related accident.

The Missouri statute operates to the disadvantage of both men and women. It discriminates against men to the extent that it denies them benefits upon the death of their working wives. But it also discriminates against women by diminishing the protection afforded to their surviving spouses. A man covered by the workmen's compensation statute knows that if he is killed in a work-related accident, his widow will receive the maximum monetary benefit possible without regard to her actual financial dependence upon his earnings. He is thereby assured that in case of his

death, his wife's overall income will be affected as little as the Act will permit.[1] The working woman, however, does not receive an equal benefit from her employment. Under the Missouri statute, her husband will receive a monetary award to replace her lost income only to the extent he can prove actual dependence on all, or part, of her earnings. The benefits provided to a working woman are therefore significantly less than those provided a similarly-situated working man.

We submit that the decisions of this Court establish that the disparate treatment of widows and widowers under the Missouri statute violates the Equal Protection Clause. In a series of cases involving comparable federal statutes, the Court has recognized that similar conclusive statutory presumptions that wives are dependent on their husbands discriminate against working women. In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Court struck down statutes providing that spouses of male members of the uniformed services were dependents for purposes of obtaining increased fringe benefits but that spouses of female members were not dependents unless they were in fact dependent for more than one-half of their support. Likewise, in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), the Court held invalid a gender-based distinction in the Social Security Act

---

[1] The Act awards the dependent spouse 66 2/3% of the deceased's average wage during the year preceding the accident. Mo. Ann. Stat. § 287.240(2) (Vernon 1979 Cum. Supp.).

that granted survivors' benefits to widows but not to widowers. As the Court concluded, "[s]ince the Constitution forbids the gender-based differentiation * * * made in the statutes before us in *Frontiero*, the Constitution also forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men" (420 U.S. at 645).

Frontiero and *Wiesenfeld* control this case and require reversal of the judgment below. It is beyond dispute that the Missouri statute provides disparate treatment for workmen's compensation death awards depending upon whether the claimant is a widow or widower. Widows are clearly favored insofar as they are exempt from the requirement of providing dependency upon their husband's earnings. But "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren*, 429 U.S. 190, 197 (1976); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Califano* v. *Webster*, 430 U.S. 313 (1977).

The gender-based distinctions of the Missouri statute do not serve important governmental objectives. Just as Stephen Wiesenfeld was precluded from receiving Social Security survivorship benefits simply because he was a widower rather than a widow, here too, appellant was ineligible for workmen's compensation because he was a widower who was not dependent on his wife's earnings. If appellant had been a widow, the Missouri statute would have presumed dependency upon her husband's earnings. As Mr. Justice Brennan wrote for the plurality in *Califano* v. *Goldfarb*, 430 U.S. 199, 206-207 (1977), "*Wiesenfeld* thus inescapably compels the conclusion * * * that the gender-based differentiation * * * is forbidden by the Constitution, at least when supported by no more substantial justification than 'archaic and overbroad' generalizations, *Schlesinger* v. *Ballard*, [419 U.S. 498, 508 (1975)], or 'old notions,' *Stanton* v. *Stanton*, 421 U.S. 7, 14 (1975), such as 'assumptions as to dependency,' *Weinberger* v. *Wiesenfeld*, [420 U.S. 636, 645 (1975)], that are more consistent with 'the role-typing society has long imposed,' *Stanton* v. *Stanton*, *supra*, at 15, than with contemporary reality. Thus, [the Missouri statute] '[b]y providing dissimilar treatment for men and women who are * * * similarly situated * * * violates the [Equal Protection Clause].' *Reed* v. *Reed*, 404 U.S. 71, 77 * * *. *Weinberger* v. *Wiesenfeld*, *supra*, at 653."

2. In upholding the constitutionality of the gender-based classifications of the Missouri workmen's compensation statute, the decision below found that "[t]he governmental objective was to require employers to alleviate the economic hardship resulting from a working spouse's death. This hardship was seen by the legislatures as more immediate and pronounced on women than on men" (J.S. App. A-10 to A-11). In the court's view, the statutory presumption of depend-

ency "appears to *favor* a woman (widow) rather than discriminate against her, in that it affords the widow death benefits on her husband's compensable death without further proof of dependency" (J.S. App. A-10; emphasis in original). As the court observed (*ibid.*):

> The data available to the general assembly at [the] time [the statute was passed in 1925] no doubt supported the concept that a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower. It seems reasonably certain that during the 1920's and 1930's it was more difficult than now for a woman to obtain employment with substantial pay and very difficult for her when, upon her husband's death, she was suddenly thrust into the job market. It seems rather obvious therefore that the purpose of the conclusive presumption of dependency was to satisfy a perceived need widows generally had, which need was not common to men whose wives might be killed while working.

The Missouri Supreme Court's decision therefore rests upon two governmental interests that it regarded as justifying the conclusive presumption of dependence for widows. First, women had suffered the effects of economic discrimination, were therefore less able than men to get employment, and were therefore more in need of benefits. Second, women were more in need of prompt payment than men, and the presumption of dependence accelerated the process of payment.

But, as we shall now show, neither of these interests justifies the gender-based classifications of the statute. Nothing suggests that the disparate treatment of widows and widowers under the Missouri workmen's compensation law is designed to remedy the effects of economic discrimination against women. Nor is there any evidence that the conclusive presumption of dependency materially hastens the process of payment of an award to a widow. In the absence of convincing governmental interests, the statute therefore is invalid under the Equal Protection Clause.

B. The statutory presumption that a wife is dependent upon her husband's earnings cannot be upheld as an attempt to remedy economic discrimination against women

1. The primary justification offered by the Missouri Supreme Court for the statutory presumption of dependency in the workmen's compensation statute is that it was intended to overcome the effects of past discrimination against women. To be sure, this Court has upheld gender-based classifications intended to "redress[] our society's longstanding disparate treatment of women." *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 209 n.8; *Califano* v. *Webster*, *supra*, 430 U.S. at 317. But such legislation can be sustained only if it "operate[s] directly to compensate women for past economic discrimination." *Califano* v. *Webster*, *supra*, 430 U.S. at 318. The "mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual

purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld, supra,* 420 U.S. at 648. Rather, where gender-based classifications are presented, this Court has undertaken a more searching review of the underlying purposes of the distinction. See *Califano* v. *Goldfarb, supra,* 430 U.S. at 211 n.9 (Brennan, J., plurality opinion); *Weinberger* v. *Salfi,* 422 U.S. 749, 785 (1975).

Weinberger v. *Wiesenfeld, supra,* and *Califano* v. *Goldfarb, supra,* involved such an examination of gender-based classifications under the Social Security Act. In both instances, the Court rejected the argument that the distinction favoring widows over widowers was designed to redress the economic difficulties confronting women. Thus, in *Wiesenfeld,* the Court found that Congress' purpose in providing benefits to young widows with children was not to redress economic discrimination against women who were unable to provide for themselves. "Rather, [the statute], linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children. Since this purpose in no way is premised upon any special disadvantages of women, it cannot serve to justify a gender-based distinction which diminishes the protection afforded to women who do work" (420 U.S. at 648).

Similarly, in *Califano* v. *Goldfarb, supra,* the Court struck down a comparable statute that awarded death benefits to an aged widow by conclusively presuming her dependency on her husband for support but awarded benefits to a widower only if he could prove dependency. In so holding the Court rejected the argument that the statute was designed to redress the legacy of economic discrimination against women. "On the face of the statute, dependency, not need, is the criterion for inclusion" (430 U.S. at 213) (plurality opinion). By conclusively presuming that all wives are dependent on their husbands, the statute favored those women who were financially independent. "The widows who benefit from the disparate treatment are those who were sufficiently successful in the job market to become nondependent on their husbands. Such a widow is the least likely to need special benefits" (430 U.S. at 221) (Stevens, J., concurring in the judgment).

Here, as in *Wiesenfeld* and *Goldfarb,* the Missouri statute is based upon dependency and not need. The term "dependent" is defined as a "relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury." Mo. Ann. Stat. § 287.240(4) (Vernon 1979 Cum. Supp.). The decisions of the Missouri Supreme Court have stated that the purpose of the Workmen's Compensation Law is to insure that actual dependents of deceased wage earners are compensated for the support lost at the death of a wage earner. See, *e.g., Maltz* v. *Jackoway-Katz Cap Co.,* 336 Mo. 1000, 1006, 82 S.W.2d 909, 912 (1934).[2]

---

[2] In *Maltz,* the court stated that the legislature intended to "ameliorate * * * the losses sustained by [the workman]

There is no provision in the Missouri Code supporting the rationale of the decision below that the legislature intended the gender-based distinction to remedy economic discrimination against women. Women and men who are totally supported by spouses with equal incomes receive equal benefits; the women do not receive more. But a nondependent woman receives the same benefits as a totally dependent one, while a nondependent man, like appellant, gets no benefits at all. Like the provisions struck down in *Wiesenfeld* and *Goldfarb*, the Missouri statute provides benefits solely on the basis of dependency. The conclusive presumption of dependency given to widows follows the "then generally accepted presumption that a man is responsible for the support of his wife * * *." *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 215 (plurality opinion). As the Court stated in *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 645, "[While] the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support[,] * * * such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."

Finally, the fact that the statute benefits *nondependent* women—those who are already successful enough in the job market to be self-supporting—to the same extent as totally dependent women shows

---

and his dependents from accidental injuries received by him in the proper course of his work" (336 Mo. at 1006, 82 S.W. 2d at 912).

beyond question that the Missouri legislature was not attempting to remedy the effects of economic discrimination against women. "To accept the * * * justification [of the Missouri Supreme Court] we must presume that [the Missouri legislature] deliberately gave a special benefit to those females least likely to have been victims of the historic discrimination discussed in *Kahn* [v. *Shevin*, 416 U.S. 351 (1974)]. Respect for the legislative process precludes the assumption that the statutory discrimination is the product of such irrational lawmaking." *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 221 (Stevens, J., concurring in the judgment). Accord: *Orr* v. *Orr*, 440 U.S. 268, 283 (1979).[3]

2. In upholding the gender-based classification of the Missouri statute, the decision below attempted to

---

[3] *Kahn* v. *Shevin*, 416 U.S. 351 (1974), upon which the decision below relied (J.S. App. A-4), is therefore distinguishable. There, the Court upheld the constitutionality of a Florida annual $500 real estate tax exemption for all widows. In the Court's view, economic statistics that showed a lower median income for women than men justified "a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden" (416 U.S. at 355). Here, however, the gender-based discrimination in the Missouri workmen's compensation statute is not based upon any presumed general economic need of widows but upon presumed dependency of wives upon their husband's earnings. Thus, the *Kahn* rationale justifying the exemption upon redress of the legacy of economic discrimination against women is inapplicable here. See *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 648. See also *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 221-224 (Stevens, J., concurring in the judgment).

distinguish *Wiesenfeld* and *Goldfarb* on the ground that they involved a form of "social insurance" (social security) with mandatory employee contributions, while the workmen's compensation benefits at issue here are a substitute for common law rights (see J.S. App. A-8 to A-9).

But this Court rejected much the same distinction only last Term in *Califano* v. *Westcott*, No. 78-437 (June 25, 1979). At issue in *Westcott* was a provision of the Social Security Act (42 U.S.C. 607) which provided AFDC benefits to families with an unemployed father but not to families with an unemployed mother. In striking down the statute, the Court rejected the argument that *Frontiero*, *Wiesenfeld*, and *Goldfarb* were inapplicable because the benefits in those cases "were a form of compensation earned by a women as a member of the labor force, or were directly related to such compensation" while the benefits in *Westcott* were part of a "noncontributory welfare program." As the Court stated (slip op. 7-8):

> The distinction between employment-related benefits and other forms of government largesse may be relevant to equal protection analysis, for example, in determining whether the differential treatment of survivor's benefits denigrates the efforts of the deceased spouse. *Wiesenfeld*, 420 U.S. at 645-647; *Goldfarb*, 430 U.S. at 206-207 (plurality opinion). This does not mean, however, that the Constitution is indifferent to a statute that conditions the availability of noncontributory welfare benefits on the basis of

> gender. The Secretary's argument to the contrary in effect invites a return to the discredited view that welfare benefits are a "privilege" not subject to the guarantee of equal protection. See *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971).

Westcott therefore demonstrates that whether a particular gender-based distinction arises out of a contractual obligation, or as part of a noncontributory scheme of benefits, the standard of review in scrutinizing gender classifications is the same. As the Court observed in *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 646, "[w]e do not see how the fact that social security benefits are 'noncontractual' can sanction differential protection for covered employees which is solely gender based." [4]

---

[4] The Missouri Supreme Court also sought to justify the statute on the ground that widowers are not deprived of benefits entirely but receive them "upon proof of dependency" (J.S. App. A-11). But the fact that some men receive benefits does not by itself cure the discriminatory effect that this statute has upon women by providing them with less protection from their employment than men. See *Califano* v. *Goldfarb*, *supra*; *Jablon* v. *Secretary of HEW*, 399 F. Supp. 118, 128 (D. Md. 1975) (three-judge court), aff'd, 430 U.S. 924 (1977); *Coffin* v. *Secretary of HEW*, 400 F. Supp. 953, 957 (D.D.C. 1975) (three-judge court), appeal dismissed, 430 U.S. 924 (1977). Cf. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971).

C. The statute cannot be upheld on the ground of a presumption that widows' dependency requires that they receive death benefits without the delay of lengthy proceedings

The Missouri Supreme Court further attempted to justify the statute on the ground that it permits widow's benefits to be awarded "without drawn-out proceedings to determine the amount of dependency" (J.S. App. A-10). But even on the assumption that the legislature intended to provide widows with death benefits without protracted hearings, such disparate treatment would be prohibited by the Equal Protection Clause. In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Court unanimously rejected much the same rationale of administrative convenience in striking down a gender-based classification for qualification as an administrator of an estate. The Court held that even though the state's interest in achieving administrative efficiency is not without some legitimacy, "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause" (404 U.S. at 76). See also *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 683; *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 205.

Moreover, economic statistics show that the gender-based classification is not so "precisely structured" (*Parham* v. *Hughes*, No. 78-3 (Apr. 24, 1979), slip op. 5 n.5) as to justify its use as a substitute for a more searching inquiry. See also *Taylor* v. *Louisiana*, 419

U.S. 522, 535 (1975); *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 689 & n.23, *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 205 (plurality opinion). Cf. *Mathews* v. *Lucas*, 427 U.S. 495, 513 (1976). Statistics regarding the employment of married women in Missouri demonstrate that the presumption of dependency of wives upon their husbands' earnings results in significant overpayments which cast substantial doubt on the argument that the presumption is based on administrative convenience. As of 1970, 39.4% of all married women in Missouri were in the labor force. United States Department of Commerce, Census of Population: 1970, Vol. 1, *Characteristics of the Population*, Part 27, Table 44.[5] For the cur-

[5] In 1920, when the Missouri workmen's compensation statute was first proposed, only 7% of married women in Missouri were employed (U.S. Department of Commerce, Fourteenth Census of the United States: 1920, State Compendium, Vol. VI, Table 25). Since that time the percentage has steadily risen (all of these figures are derived from Census Reports of the Department of Commerce). For 1920, 1930, and 1940, citation is to total number of married women in labor force; total number of married women in the state appears in Sixteenth Census of the United States, Vol. IV, Population, Characteristics by Age, Table 6):

Year	% of Married Women Employed	
1930	10.1%	(Vol. IV, Population, Occupations by States, Table 15)
1940	11%	(Vol. III, Population, Labor Force, Table 8)
1950	21%	(Vol. II, Characteristics of Population, Part 25, Table 70)
1960	30%	(Vol. I, Characteristics of Population, Part 27, Table 52)
1970	39.4%	(see above)

rent year, the figure is probably much higher. According to a 1979 report of the Department of Health, Education, and Welfare, in 1978, 48% of all married women in the United States were actively in the labor force. United States Department of Health, Education, and Welfare, *Social Security and the Changing Roles of Women* 21 (Feb. 1979). Accordingly, in a substantial percentage of cases the conclusive presumption of a wife's total dependence is inaccurate, as the widow has income of her own. In the light of these figures, administrative convenience cannot justify the presumption of dependency. Missouri's presumption of dependency "has little relationship to present reality." *Weinberger* v. *Wiesenfeld, supra,* 420 U.S. at 643 n.11. *Cf. Califano* v. *Goldfarb, supra,* 430 U.S. at 239 n.7 (Rehnquist, J., dissenting).

At all events, nothing in the Missouri workmen's compensation statute or its legislative history suggests that the legislature intended to insure that benefits would be paid to widows any more rapidly than benefits are paid to anyone else. There is no exception for widows under the provisions of the statute which permit hearings when the employer and dependents cannot agree on the level of compensation, or other matters relating to an award. See Mo. Stat. Ann. § 287.450 (Vernon 1979 Cum. Supp.). The order of the Industrial Commission referee can be reviewed by the Industrial Commission at the request of any party made within 20 days of the date of the award. There is no exception for awards payable to widows, and no time limitation for the commission's review other than the direction that it commence "as soon as practicable." Mo. Stat. Ann. § 287.480 (Vernon 1979 Cum. Supp.). Within 30 days after the award is entered by the commission, any party can request judicial review. Although all of such cases are given priority status, there is no expedited treatment for awards to widows. Mo. Stat. Ann. § 287.490 (Vernon 1965).

Even where the employer and the claimant agree on an award, the Missouri Code provides that the agreement is not valid until "approved by an administrative law judge or the commission, nor shall an administrative law judge or the commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter." Mo. Ann. Stat. § 287.390 (Vernon 1979 Cum. Supp.). Once again, there is no limit on this review procedure, and no special expedition for claims of dependent widows. In sum, the Missouri Workmen's Compensation Law is not designed to eliminate or short-circuit the procedures for the resolution of widows' death benefit claims, on the basis of a presumption of widows' dependency—even if such a presumption would validly provide a basis for doing so.

II. THIS COURT SHOULD REMAND THE CASE TO THE MISSOURI SUPREME COURT TO SELECT THE METHOD OF CURING THE CONSTITUTIONAL VIOLATION

If, as we submit, the Court holds Missouri's gender-based classification to violate the Equal Protection Clause, there are two equally valid methods available

for curing the defect. The presumption of dependence can be extended to widowers or eliminated for widows.

On several occasions this Court has extended federal benefits to persons previously unconstitutionally excluded from coverage, rather than cutting back on coverage as a means to eliminate a constitutional violation. See *Califano* v. *Westcott*, No. 78-437 (June 25, 1979), slip op. 12-13. Whether the presumption of dependence should be extended or invalidated requires the Court to determine which approach is most consistent with the purposes of the legislation (*Welsh* v. *United States*, 398 U.S. 333, 361-367 (1970) (Harlan, J., concurring); *Kalina* v. *Railroad Retirement Board*, 541 F.2d 1204 (6th Cir. 1976), cert. denied, 431 U.S. 909 (1977); *Arp* v. *Workers' Compensation Appeals Board*, *supra*, 19 Cal.3d at 407-408, 563 P.2d at 856, 138 Cal. Rptr. at 300), as well as to consider the practicalities inherent in extension or invalidation. See, *e.g.*, *Jablon* v. *Secretary of HEW*, 399 F. Supp. 118, 131-132 (D. Md. 1975) (three-judge court), aff'd, 430 U.S. 924 (1977).

In the present case, where a state rather than federal program is involved, there is little legislative history to serve as a guide. In several instances, when state programs involving sex discrimination claims were at issue, this Court declined to direct a specific remedial approach but simply declared the state statute unconstitutional and remanded the case to allow state authorities to choose an appropriate method of remedying the constitutional violation.[6]

[6] The three state court decisions declaring conclusive presumptions identical to Missouri's unconstitutional have taken differing approaches with respect to remedy. In *Arp* v. *Workers' Compensation Appeals Board*, *supra*, the California Supreme Court invalidated the presumption, concluding that expanding the coverage of the Act by extending the presumption is more properly a legislative than judicial duty. 19 Cal. 3d at 409, 563 P.2d at 857, 138 Cal. Rptr. at 301. The New Jersey Supreme Court approved an order extending the presumption to widowers, holding that that approach was "least destructive of the dominant legislative plan." *Tomarchio* v. *Township of Greenwich*, *supra*, 75 N.J. at 76, 379 A.2d at 854. The Appellate Division of the New York Supreme Court extended the presumption to widowers "[u]ntil further legislative action is taken." *Passante* v. *Walden Printing Co.*, *supra*, 53 A.D.2d at 13, 385 N.Y.S.2d at 181.

Orr v. *Orr*, 440 U.S. 268 (1979); *Craig* v. *Boren*, 429 U.S. 190, 210 n.24 (1976); *Stanton* v. *Stanton*, 421 U.S. 7, 13-18 (1975). See also *Skinner* v. *Oklahoma*, 316 U.S. 535, 542-543 (1942). Because either extension or invalidation of the presumption would be constitutionally valid, we submit that the case should be remanded to the Missouri Supreme Court to select the remedy more closely in accord with the intent of the state legislature.[7]

[7] There are 43 states that treat male and female spouses equally under workers' compensation statutes (See Appendix, *infra*). Of that number, only five (Arkansas, California, Maryland, Virginia, and West Virginia) require a surviving spouse living with the deceased at the time of death to prove actual dependency to receive benefits. Several states require a spouse living apart to show actual dependency for support at the time of death.

CONCLUSION

The judgment of the Supreme Court of Missouri should be vacated and the case remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MARK L. GROSS
Attorneys

DECEMBER 1979

APPENDIX

I. States in which workmen's compensation law makes no distinction in the eligibility of widows and widowers for death benefits:

Ala. Code § 25-5-61
Alaska Stat. § 23.30.215
Ariz. Rev. Stat. Ann. § 23-1046
Ark. Stat. Ann. § 81-1315
Cal. Lab. Code §§ 3501(a), 3502 (West), declared unconstitutional in *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal.3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977)
Colo. Rev. Stat. § 8-50-101
Conn. Gen. Stat. Ann. § 31-306 (West)
Del. Code Ann. tit. 19, § 2330
Fla. Stat. Ann. § 440.16 (West)
Hawaii Rev. Stat. § 386-42
Ill. Ann. Stat. ch. 48, § 138.7(a) (Smith-Hurd)
Iowa Code Ann. § 85.42 (West)
Kan. Stat. Ann. §§ 44-508(c), 44-510(b)
Ky. Rev. Stat. § 342.075
La. Rev. Stat. Ann. § 23:1251 (West)
Me. Rev. Stat. Ann. tit. 39, § 2.4
Md. Ann Code art. 101, § 36(8)(a)
Mass. Ann. Laws ch. 152, § 32 (Michie/Law. Co-op)
Minn. Stat. Ann. § 176.111 (West)
Mont. Rev. Codes Ann. § 92-413
Neb. Rev. Stat. § 48-124
Nev. Rev. Stat. § 616.510
N.H. Rev. Stat. Ann. § 281:2-IX
N.J. Stat. Ann. § 34:15-13(f) (West), declared unconstitutional in *Tomarchio* v. *Township of Greenwich*, 75 N.J. 62, 379 A.2d 848 (1977)

N.M. Stat. Ann. § 52-1-17
N.Y. Work. Comp. Law § 16.1-a & b (McKinney)
N.C. Gen. Stat. § 97-39
N.D. Cent. Code § 65-05-17
Ohio Rev. Code Ann. § 4123.59(D)(1) (Page)
Okla. Stat. Ann. tit. 85, § 3.1(2) (West)
Or. Rev. Stat. § 656.204
R.I. Gen. Laws § 28-33-13(a), (b)
S.C. Code § 42-9-110
S.D. Codified Laws § 62-4-21
Tenn. Code Ann. § 50-1013(a)(1)
Tex. Rev. Civ. Stat. Ann. art. 8306, § 8 (Vernon)
Utah Code Ann. § 35-1-71(2)
Vt. Stat. Ann. tit. 21, § 634(2)
Va. Code § 65.1-66(1), (2)
Wash. Rev. Code Ann. § 51.32.050
W.Va. Code § 23-4-10(d)
Wis. Stat. Ann. § 102.51 (West)
Wyo. Stat. § 27-12-408

II. States in which workmen's compensation law distinguishes between widows and widowers for death benefits by presuming that widows, but not widowers, are dependent:

Ga. Code Ann. § 114-414
Idaho Code § 72-410
Ind. Code Ann. § 22-3-3-19 (Burns)
Mich. Stat. Ann. § 17.237 (331)
Miss. Code Ann. § 71-3-25
Mo. Ann. Stat. § 287.240(4)(a) (Vernon)
Pa. Stat. Ann. tit. 77, § 562 (Purdon)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 307381 166